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THE 1970 HAGUE CONVENTION

R. H. MANKIEWICZ*

The Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970, provides inter alia that, if the contracting state in which the hijacker and his accomplices are found does not extradite them to the state wishing to prosecute them, it shall submit the case to its own competent authorities for the purpose of prosecution. Professor Mankiewicz points out that this convention is a milestone both in the general development of an international criminal air law and in the fight against aerial hijacking, specifically. The article discusses the scope and meaning of the provisions of the new convention and suggests that a welcome precedent has been established for similar rules with respect to other unlawful interferences with international civil aviation. In his introduction, the author outlines some general problems arising in connection with the prosecution and punishment of crimes committed on board aircraft.

I. INTRODUCTION

1. *Problems with respect to offenses committed on board aircraft in flight.*

OFFENSES committed on board aircraft against the criminal laws of overflown states have special features normally absent from offenses perpetrated on the ground.¹ First, even minor offenses such as assault or a fist-fight between passengers may endanger the safety of other passengers even though it may not require the intervention of a flight crew member who would thereby be distracted from his in-flight duties. Second, in regions of the world where high-speed aircraft cross several national borders within minutes, it might be difficult, even impossible, to determine the country in which the offense was committed. Third, except where the state of registration of the aircraft has made the law of the

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¹ For a more detailed survey see Mankiewicz, *Aspects du Problème du Droit Penal de l'aviation Internationale*, 1958 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 112; Mankiewicz, *Le Droit Penal de l'aviation*, 4 MCGILL L.J. 13 (1957). See generally Mendelsohn, *In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention*, 53 VA. L. REV. 509, 513 (1967).

flag applicable thereto,² if the act is committed over the high seas the offense may not be punishable because of the lack of an applicable national law. Even the doctrine of the law of the flag is not necessarily a panacea.³ Finally, the alleged offender may disembark in a state which either has no jurisdiction or, having jurisdiction, has no desire to exercise it. Moreover, that state may also be unwilling to extradite the offender to a state where he could be punished. In addition, it may happen that a state having jurisdiction may not even request extradition because of the expense and legal difficulties involved.

When the multiple aspects of these and related problems were discussed by the Seventh International Congress of Criminal Law, held in Athens in 1956, several jurists⁴ suggested that the proper solution is to adopt a rule whereby any offense committed on board an aircraft in flight would be an international crime in the same way as other international crimes such as genocide, white slave trade, counterfeiting, or narcotics traffic.⁵

The Legal Committee of the International Civil Aviation Organization has considered these problems since the early 1950s in connection with its overall study of the legal status of aircraft.⁶ However, the first convention resulting from that study, namely the Convention on Offenses and Other Acts Committed on Aircraft in Flight, signed in Tokyo on September 14, 1963,⁷ did not attempt to solve the problems.

2. *The Tokyo Convention*

In addition to explicitly recognizing the well-established rule of international law that "the [s]tate of registration of the aircraft is competent to exercise jurisdiction over offenses and acts committed on board. . . ." and further requiring each contracting state to "take such measures as may be necessary to establish its jurisdiction as the [s]tate of registration over offenses committed on board an aircraft registered in such [s]tate. . . .," the main achievement of the Tokyo Convention was specify the

² This has been done in many countries, e.g., Argentina, Brazil, Belgium, Canada, Ceylon, France, Greece, Mexico, United Kingdom and the Scandinavian countries.

³ See *Regina v. Martin*, [1956] 2 All E.R. 86 (H.L.); Jennings, *International Civil Aviation and the Law*, 22 Brit. Y.B. Int'l L. 191 (1945).

⁴ See *Reports Submitted to the 7th International Congress of Criminal Law*, [1956] REVUE INTERNATIONALE DE DROIT PÉNAL (Nos. 3 & 4), 1957 REVUE (Nos. 1 & 2).

⁵ INT'L LAW ASS'N, THIRTY-SEVENTH ANNUAL REPORT (1952) and FORTY-THIRD ANNUAL REPORT (1958).

⁶ ICAO, WD/LC/LEGAL STATUS 10 and 24; ICAO Doc. No. 8302-LC/150 (1963).

⁷ Convention on Offenses and Certain Other Acts Committed on Board Aircraft, opened for signature Sept. 14, 1963, [1969] 20 U.S.T. 2941, T.I.A.S. 6768, art. 3 [hereinafter cited as Tokyo Convention]. The official text of the Convention is available through ICAO Headquarters, Montreal, Canada, ICAO Doc. No. 8364 (1963). The authentic English text appears in Boyle & Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. AIR L. & COMM. 305, 326-52 (1964).

powers of the commander of an aircraft engaged in international flight "when he has reasonable ground to believe that a person has committed . . . offenses against penal laws . . . or acts which . . . jeopardize the safety of the aircraft or of persons or property therein, or which jeopardize good order and discipline on board."⁸ Nevertheless, by accepting a proposal first made by delegates from the United States and Venezuela,⁹ the Tokyo Convention, albeit in a very summary fashion, went far beyond problems arising from the legal status of aircraft and became the first international instrument to deal with the unlawful seizure of aircraft. Article 11 of the Convention provides that in cases of such seizure all contracting states "shall assist in restoring control of the aircraft to its lawful commander. . . ." and that the contracting state in which the aircraft lands shall "permit its passengers and crew to continue their journey as soon as practical. . . . [and] . . . return the aircraft and its cargo to the persons lawfully entitled to possession."¹⁰ Although the expression "unlawful seizure of aircraft," which is used in the title of Chapter IV¹¹ of the convention, is not otherwise defined, it follows from article 11 that it is any act by which "a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or wrongful exercise of control of an aircraft in flight, or is about to commit such an act."

Since the twelve ratifying signatures required for the enforcement of the Convention were not forthcoming with the desired speed and, since hijacking and other acts of aerial sabotage rapidly became the order of the day, the Assembly and the Council of ICAO made repeated appeals to contracting states for early ratification and even suggested application of the principles of the Convention before formal ratification.¹²

3. *The Meaning of "Unlawful Seizure" and "Unlawful Deviation" of Aircraft*¹³

Hijacking, which is not "aerial piracy" within the meaning of the Geneva Convention,¹⁴ is basically committed by a person on board an aircraft. However, aircraft can, and indeed have been, seized and deviated unlawfully by persons on the ground, or even by a willing aircraft

⁸ For general discussions see Fitzgerald, *The Tokyo Convention of 1963*, 1964 CAN. Y.B. INT'L L. 19; Golstein, *Le Convention Relative aux Infractions*, 1964 REVUE FRANCAISE DE DROIT AERIEN 191; M. LITVINE, DROIT AERIEN 130 (1970).

⁹ ICAO Doc. No. 8302-LC/150, vol. II, at 102 (1963).

¹⁰ Tokyo Convention, art. 11.

¹¹ The said article 11 is the only article in Chapter IV — Unlawful Seizure of Aircraft.

¹² Assembly Resolutions A16-36 and A17-2, ICAO Doc. No. 8770 (1965).

¹³ See 1968 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 770, 775.

¹⁴ For a discussion of the relationship of "piracy" and "hijacking" see Mr. Samuels' discussion, *supra* at 163-70.

commander.¹⁵ Consequently, the Resolution on Air Law, adopted by the Fifty-Third Conference of the International Law Association in Buenos Aires in 1968, aimed at the suppression of unlawful deviation of aircraft in general, hijacking being only one means of committing that offense.¹⁶ However, according to established ICAO terminology as well as to most commentators,¹⁷ the expression "unlawful seizure of aircraft" applies only to acts of unlawful interference with the control of an aircraft committed by a person on board.

4. *Special Problems of Prosecution*

Although the criminal laws of many states do not define nor punish the specific offense of hijacking, this does not raise particular difficulties in prosecuting the "unlawful seizure of aircraft." In most instances any act of hijacking involves several offenses under the criminal laws of all states.¹⁸ Indeed, experience with the enforcement of the rules of general criminal law in the United States and elsewhere has shown that such offenses are not necessarily minor and can result in severe penalties, including life imprisonment.¹⁹

The peculiar difficulty in the prosecution of the perpetrator of an unlawful seizure of an aircraft stems from the fact that by the time he leaves the aircraft, he normally is in a state which, he expects, will grant him asylum or of which he is a citizen. Inevitably, he will not be extradited to the state where the hijacking took place or that may have jurisdiction under the "law of the flag."²⁰ Furthermore, no guarantee exists that the state of disembarkation will be willing to exercise its own jurisdiction under these circumstances, even though that state is one of those within which the hijacking, a "continuing offense,"²¹ has been committed. As a result, the hijacker and his companions are likely to go unpunished,

¹⁵ See, e.g., the problems raised by the capture of the aircraft carrying M. Ben Bella, P. de La Pradelle, 1956 REVUE GENERALE DE L'AIR 233 and the Tchombe case, E. du Pontavice, 1970 REVUE GENERALE DE L'AIR 276, 278.

¹⁶ INT'L LAW ASS'N, FIFTY-THIRD ANNUAL REPORT, B.A. Consult. Ass., 1st Sess., at xxi, at 112 (1968).

¹⁷ See, e.g., Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 AM. J. INT'L L. 695, 696 (1969).

¹⁸ For Canadian as well as general criminal law, see articles cited in note 1 *supra*. See also ICAO Docs. A1 7-WP/34 (Sweden), A1 7-34 (The Netherlands), A1 7-57 (Yugoslavia), A1 7-114 (Australia).

¹⁹ For punishment under United States criminal law, see *United States v. Bearden*, 304 F.2d 532 (5th Cir. 1962), *vacated on other grounds*, 372 U.S. 252 (1963) (*per curiam*), *obstruction of commerce charge aff'd*, 320 F.2d 99 (5th Cir. 1963), *cert. denied*, 376 U.S. 922 (1964). See also *Tribunal de Grande Instance de Corbeil*, 1969; REVUE GENERALE DE L'AIR ET DE L'ESPACE 358 (1969) (French punishment); *Tribunal of the French Military Government of Berlin*, 1970 (German punishment); JURIS CLASSEUR PERIODIQUE 16.540.

²⁰ See 1968 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 518, 522. ICAO WD LC/DT 744-2 (22).

²¹ See Samuels, *supra* at 167, n.27.

particularly since they normally will avoid entering a state which has and will exercise jurisdiction.

On the other hand, if it is agreed by treaty that irrespective of the place where the unlawful seizure was committed, its perpetrator and accomplices can be prosecuted and punished in any state where they happen to be, then, while they may in fact remain unpunished, they will be confined to the state of disembarkation. Thus, effective repression requires the offense to be made international. A suggestion to this effect was made by the observer of the International Law Association to the ICAO Legal Committee,²² but none of its members was willing to lend support.²³ The Hague Conference, as will be seen, reversed the stand taken by the ICAO Legal Committee.

II. THE 1970 HAGUE CONVENTION²⁴

Before going into a critical analysis of the rules of the Convention, this writer wishes to point to the remarkable feat achieved by The Hague Convention which was to provide that, additionally to the previously-agreed jurisdictions of the state of registration, or of the place of residence of the lessee, of the aircraft and of the state where the hijacked aircraft lands (with the hijacker on board), jurisdiction rests also with the state in the territory of which "the alleged offender is found." whether or not the offense was committed in that territory.

1. *The Scope of the Convention*

It is noteworthy that the Convention neither uses nor defines the expression "unlawful seizure of aircraft" which, however, appears in its title.²⁵ Instead, article 1 specifies the acts constituting "the offense" to which the Convention applies and which, in accordance with article 2, "each contracting State undertakes to make . . . punishable by severe penalties." With slight drafting changes, the description of these acts is the same in article 1 of The Hague Convention as in the aforementioned article 11 of the Tokyo Convention. Accordingly, the offense to which The Hague Convention applies is committed by "any person who on board aircraft in flight, unlawfully, by force or threat thereof, or by any

²² ICAO WD LC/DT 744-2 (22).

²³ For the proceedings of the ICAO Legal Committee and its subcommittee which prepared the draft convention submitted to The Hague Conference see ICAO Doc. No. 8838 at 103; ICAO Doc. No. 8877, at 23; Mankiewicz, 1969 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 462 and 1970 REVUE FRANCAIS DE DROIT AERIEN 141.

²⁴ Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, I.C.A.O. Doc. 8920, art. 11 [hereinafter cited as *Hague Convention*].

²⁵ Contrary to the 1963 Tokyo Convention and the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of International Civil Aviation, The 1970 Hague Convention has no preamble.

other form of intimidation, seizes, or exercises control of that aircraft, or attempts to perform any such act."

In accordance with this definition, only a seizure effected by force, threat of force or intimidation is an "unlawful seizure" within the meaning of the new Convention.²⁶ The words "any other form of intimidation" are to be construed in the light of the authentic French text of the Convention, from which these words are absent. They refer only to moral compulsion which is also comprised in the French word "violence."

Since, under article 1, the act must be committed by a person "on board an aircraft in flight," the Convention does not apply to an attempt to seize or exercise control of an aircraft by a person on the ground or in another aircraft. This limitation of the Convention's scope is unfortunate. In fact, proposals had been made both within the ICAO Legal Committee and Sub-Committee and at The Hague Conference to extend "unlawful seizure" to acts committed by persons outside the aircraft or while the aircraft is not in flight.²⁷ The Conference, however, rejected the extension by thirty-five votes, with fifteen votes in favor of passage and fourteen abstentions.

This decision has had an unfavorable influence on the application of the Convention to accomplices. The Convention clearly applies to an accomplice under article 1, but because of the manner in which the article is drafted such complicity is covered only if the accomplice was also on board an aircraft in flight.²⁸

The expression "in flight" appearing in article 3 was defined in the Legal Committee's draft in accordance with the definition used in article 1 of the Tokyo Convention, but the Diplomatic Conference rightly substituted the definition appearing in article 5 of that convention. Hence, an aircraft is considered to be "in flight" from the moment when all external doors are closed following embarkation," not only from the moment when power is applied for take-off; it ceases to be "in flight" "when any such door is opened for disembarkation," not at the prior moment when the aircraft has come to a final stop. This limitation leaves outside the scope of the Convention any hijacking initiated or attempted before the closing or after the opening of the aircraft's doors. As a consequence, such acts are punishable only under the law of the state where

²⁶ During the preparatory work in the ICAO Legal Committee, as well as at The Hague Conference, several proposals were submitted with a view toward adding fraudulent maneuvers, deceptions and similar acts as means of committing the offense, but none of these proposals received wide support. See note 22 *supra*. The proceedings and minutes of The Hague Conference are not yet published.

²⁷ See 1970 REVUE, *supra* note 23.

²⁸ A proposal to eliminate that restriction by redrafting article 1 had been made unsuccessfully by the delegate of Israel during the debates of the ICAO Legal Committee. ICAO Doc. No. 8877, at 22 (1969). It was renewed at The Hague Conference by the delegate of the Netherlands, but was rejected by the Conference by 35 votes against, 24 in favor and 11 abstentions. ICAO Doc. SA 23 (1970).

committed; the jurisdictional articles of the new Convention do not apply thereto. Furthermore, it follows that such acts are punished merely by the general criminal or air law of the concerned state, unless special legislation is introduced for punishing unlawful seizure committed or attempted on the ground.²⁹

A further, equally undesirable restriction is found in the third paragraph of article 3, which limits the offense described in article 1 to "unlawful seizure" of aircraft committed during flight with an "international character." This "international character" is defined rather curiously: according to article 3, the Convention applies only if the place of take-off or the place of actual landing is situated outside the state of registration of the aircraft. Under this rule, the relevant place of landing is not necessarily the one specified in the time-table or in the flight plan of the aircraft. Hence, if a hijacking is committed or attempted on board a Canadian aircraft flying from Montreal to New York City, for example, and the aircraft returns immediately to Montreal or Toronto (rather than landing in New York City or elsewhere outside Canadian territory), the unlawful act is outside the scope of the Convention.³⁰

Generally, the Convention applies to all flights ending actually in a state other than the one from which the aircraft took-off. It intended to exclude all "domestic" flights; *i.e.* if the places of take-off and actual landing are within the same state. Nevertheless, it follows from article 3 that the Convention does apply in the latter case, provided the state is not the state of registration of the aircraft.

In other words, the Convention applies to "domestic flights" outside the state of registration. Hence, it is rather difficult to understand why it is inapplicable to domestic flights within that state. In support of that exclusion it is argued that the unlawful seizure of an aircraft within the state of registration falls automatically under that state's jurisdiction and thus does not give rise to any international legal problem. This argument is weak, however, as it applies with equal force when the departure, hijacking and actual landing take place in the same state, if that state is not the one of registration. Moreover, the argument is illogical if one considers that the Convention does apply in such a case, even though the foreign registered aircraft, which has taken-off and actually landed within the same state, in fact is operated by an airline of that same state under a charter, lease or interchange agreement. Since such case of a purely "domestic" hijacking is treated as "international," it is surprising to discover that the sophisticated drafting of article 3 results in *preventing*

²⁹ The mere ratification of the Convention and its domestic application would not achieve this end. See 1970 REVUE, *supra* note 23.

³⁰ Such seizure has actually taken place and its perpetrators have been punished under French criminal Law. See *Tribunal de Grande Instance de Corbeil*, *supra* note 19.

the application of the Convention when the places of take-off and actual landing, although situated within the state of registration, in fact are separated by the high seas or by a foreign state.

These fine distinctions appearing in article 3 are regrettable, for any hijacked aircraft, whether on a domestic or on an international flight, presents an obvious and serious hazard to both international and domestic aviation. The Convention should apply to *any* unlawful seizure of aircraft, the geographical location of the places of departure and landing, as well as the nationality of the aircraft, notwithstanding.³¹

A possible difficulty arising from the link between the nationality of the aircraft and the scope of the Convention concerned the latter's application to unlawful seizure of aircraft operated by an international operating agency. According to the resolution of the ICAO Council December 14, 1967, relating to the application of article 77 of the Chicago Convention,³² these aircraft are not registered in any particular state;³³ hence, their unlawful seizure would always fall within the scope of The Hague Convention, irrespective of the location of the places of take-off and landing in a particular state. Article 5, to which refers article 3, paragraph 4, is intended to avoid this problem, however, by providing that the contracting states that are parties to a joint air transport operating agency shall, "by appropriate means, designate for each aircraft the [s]tate among them which shall exercise the jurisdiction and have the attributes of the [s]tate of registration. . . . [and] . . . shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all [s]tates [p]arties to this Convention."³⁴ Under article 3, paragraph 4, the state so designated is deemed to be the state of registration within the meaning of paragraph 3 of that article.

³¹ Interesting problems are presented by the question whether it was wise to link the scope of The Hague Convention to the nationality of the aircraft. Query, what is the result in the case in which a state is entitled and willing to exercise jurisdiction under the Convention but the aircraft concerned is registered in a state which is not party to the Convention and objects to such application? Similarly, what are the consequences when the aircraft, registered in a state party to the Convention, is operated by an airline which is under the jurisdiction of a state *not* a party to the Convention and objects? Although the answers to these questions are beyond the scope of this paper, they may acquire an added importance if provision were to be made for sanctions against states defaulting their obligations under The Hague Convention, as proposed by Canada and the United States. See *Summary of the Work of the Legal Committee During its 18th Session*, ICAO Doc. 8910; ICAO LC/SC CR WD/2.

³² Convention on International Civil Aviation (Chicago Convention), Dec. 7, 1944, art. 77, 61 Stat. 1180, 1202, T.I.A.S. 1591 (effective April 4, 1947).

³³ See generally Robinson, *Changing Concepts of Sabotage: A Challenge to the Status of United States Carriers in International Civil Aviation?*, 34 J. AIR L. & COMM. 533 (1968); Mankewicz, *Les aéronefs internationaux*, 1962 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 685 and 1967 ANNUAIRE 487.

³⁴ Article 5 is based on article 18 of the Tokyo Convention which was the first convention to deal with such "international" aircraft, and it proceeded above-mentioned resolution of the ICAO Council by four years.

Finally, while the Convention applies only to unlawful seizure of aircraft committed on an international flight, the jurisdiction of contracting states over the alleged hijacker and his accomplices is not limited in the same fashion. Indeed, article 3, paragraph 4, explicitly provides that articles 6, 7, 8 and 10, dealing with jurisdiction, apply "whatever the place of take-off or the place of actual landing of the aircraft."

2. *Criminal Jurisdiction*

If hijacking is to become an international offense, it is not enough to only provide for its punishment regardless of the place where the offense is committed; effective repression also requires prosecution and punishment in any state where the offender can be found. The Hague Convention has practically reached this goal by going far beyond the rules set forth in the draft convention prepared by the ICAO Legal Committee.

Under the draft convention only the state of registration and the state where the aircraft landed "with the alleged offender still on board" were obliged to establish their jurisdiction over the offense. The Hague Convention, however, has enlarged these provisions significantly.³⁵

Taking into account the increasing number of aircraft leased without crew, it provides that jurisdiction must also be established by the state in which the lessee of the hijacked aircraft has his principal place of business or, if no such place of business exists, his permanent residence.³⁶ In addition, paragraph 2 of article 4 requires every contracting state to "take such measures as may be necessary to establish its jurisdiction over the offense in the case where the alleged offender is present in its territory and it does not extradite him."³⁷ The provision is necessary in order to increase the possibility of effective punishment, even if the hijacker is not prosecuted in, or escapes from, the state of landing or is not extradited to the state of registration of the aircraft.

Unpleasant experience demonstrates that attempted or completed acts of hijacking may be accompanied by the commission of other, equally serious offenses on board the aircraft. Therefore, article 4, paragraph 1, through a useful extension of the provisions relating to jurisdiction, provides that in addition to establishing jurisdiction over the unlawful seizure of aircraft, the aforementioned states shall also establish jurisdiction over "any other act of violence against passengers or crew com-

³⁵ See Hague Convention, art. 4.

³⁶ *Id.*, art. 4, para. 1, sub-para. c.

³⁷ By providing that any state where the hijacker happens to be shall also establish its jurisdiction, the Convention has actually made the unlawful seizure of aircraft an international offense. If the offender is granted asylum and is not prosecuted in the state where he lands, the new provision results in persuasively inducing him to stay in the territory of that state because he risks prosecution in any other state to which he may later wish to go.

mitted by the alleged offender in connection with [the hijacking]." This provision is even more useful when the state in which the hijacker is located does not wish to prosecute him for having unlawfully seized the aircraft, although it might be willing to prosecute him for other violent offenses committed on that occasion.

Although article 4 requires the contracting states to assume jurisdiction over the unlawful seizure of aircraft within the limits of article 3, it does not answer whether each of the states is additionally obliged to actually prosecute the alleged offender. The answer to this question is the subject of article 7:

The contracting [s]tate in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that [s]tate.

Differing views are possible concerning the actual meaning and scope of the article, especially in light of the discussions preceding its adoption. Australia and thirteen European countries felt that an absolute obligation to prosecute a hijacker may be repugnant to many states wishing to preserve the traditional right to refrain at will from prosecuting alleged offenders. Thus, they proposed an alternative provision, in line with the language of article 7 of the draft convention prepared by the ICAO Legal Committee, to read: "shall . . . be obliged to submit the case to its competent authorities for *their decision* whether to prosecute him." Nevertheless, the proposal was rejected at the plenary meeting of the Conference by twenty votes, with twenty-two states voting for passage and eleven abstentions. The result was the words "shall be obliged *without exception whatsoever*,"³⁸ previously inserted by the Committee of the Whole, were retained. This series of events could be invoked to support the thesis of an absolute obligation to prosecute alleged hijackers.

Whether there should be provided an exception to the obligation to institute criminal proceedings against hijackers that were politically motivated had already been raised by the Sub-Committee of the ICAO Legal Committee. Both the Sub-Committee and the full Committee had preferred to remain silent on the point.³⁹ The issue was again pressed by the United States at the Conference, with the support of several states including the Soviet Union. Specifically, they proposed to add the words "irrespective of its motivation," following the word "obliged."⁴⁰ This

³⁸ Hague Convention, art. 7 (emphasis added).

³⁹ ICAO Doc. No. 8838, at 6, ICAO Doc. No. 8877, at 7, 55.

⁴⁰ PROPOSAL SUBMITTED TO SUBCOMM. ON UNLAWFUL SEIZURE OF AIRCRAFT OF THE LEGAL COMM. OF ICAO, LC/SC.SA. WD7 (May 5, 1969).

proposition again met opposition. Thereupon, the delegate of Kenya proposed replacement of the suggested wording with "without exception whatsoever," since these words already appeared in Resolution 2264 (XXV) of the General Assembly of the United Nations. The latter proposal was adopted by sixty-one votes, ten states voting against passage with eleven abstentions.

There was no unanimity among the delegates about the meaning of the clause, "without exception whatsoever." Several delegates argued that the words make it unlawful under the Convention for a state to rely on the political motives or other circumstances of the unlawful seizure in order to refuse to prosecute or extradite the alleged offender. Yet, while the Convention certainly does not exclude unlawful seizure committed for political reasons, an equally valid argument can be made that a state may lawfully refuse to prosecute an alleged offender that it does not wish to extradite. For under the last sentence of article 7, all that is required is for competent authorities to "make their decision in the same manner as in the case of ordinary offense of a serious nature under the law of that [s]tate." Many commentators,⁴¹ including this writer, take the position that this clause should be construed to mean that if the hijacking was politically motivated in the view of the competent authorities, or if for any other reason prosecution is considered to be inappropriate, the competent authorities of contracting state should have the right not to begin criminal proceedings by the same extent to which that state's general criminal law and traditions permit them to abstain from prosecution "in the case of any ordinary offense of a serious nature" which has a political flavor or in which they would consider prosecution undesirable for the very same reason. In this respect, it must be remembered that various states have a long and cherished tradition of non-prosecution or "special treatment" for political offenses and offenders and, moreover, grant an absolute right to their competent authorities to abstain from prosecution for reasons of convenience. This is particularly true in cases involving offenses committed abroad or having political undertones. Thus, despite a *prima facie* impression to the contrary, a correct reading of article 7 leads to the conclusion that authorities having jurisdiction under article 4 are at liberty not to prosecute a hijacker and his accomplice if it is determined that the offenders would not be prosecuted had they committed another "ordinary offense of a serious nature" under comparable circumstances. In states having a long-established tradition of sovereign discretion in these matters, particularly in the case of offenses committed abroad, a stricter interpreta-

⁴¹ Guillaume, *La Convention de La Hague des 16 decembre 1970*, [1970] *ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL* 36; Gilliam & White, *The Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 1971 *REVIEW OF THE INT'L COMM'N OF JURISTS* 37.

tion of article 7 might well result in the non-ratification of the Convention. And the threat that the construction proposed in this paper may encourage hijacking is minimal. A hijacker will never be able to determine beforehand how articles 4 and 7 will be construed, as well as what decision will be taken, by the authorities of the state in which he desires to take refuge. If the state of actual landing does not prosecute him, the offender will think twice before venturing abroad.

3. *Extradition*

Several states proposed compulsory extradition by any state in which the alleged offender is found, but not prosecuted. Although the proposal met with little favor with the majority of the delegates who were unwilling to see the Convention become an extradition treaty, important progress toward the effective suppression of hijacking was nevertheless made by specifying in article 8 that the act is "an extraditable offense" in any existing extradition treaty between the contracting states. Further, the act is to be included specifically in every extradition treaty concluded between the contracting states in the future. Finally, article 8, paragraph 2, provides that if such a treaty does not exist between the involved states, and if the requested state conditions extradition on its existence, that state "may at its option" consider the Convention "as the legal basis for extradition," "subject to the other conditions provided by the law of the requested [s]tate." If, however, an extradition treaty is not required, contracting states "shall recognize the offense as an extraditable offense between themselves, subject to the [same] conditions."

The Convention also provides that unlawful seizure of aircraft shall be "treated for the purpose of extradition between contracting [s]tates as if it had been committed not only in the place in which it occurred but also in the territories of [the three states specified in article 4, paragraph 1]." However, since the unlawful seizure of aircraft cannot be "treated as if it had been committed" in the place in which it occurred (for it actually has been committed in that place), the rule is surprising. Furthermore, the offense is continuous; it continues indeed to be committed from the moment commenced until the moment terminated. Consequently, it is actually committed in all overflown states during that period, including the state of actual landing. The latter is singled out in article 8, albeit by reference, but the others are not even mentioned.

Although the language of article 4, paragraph 3, indirectly preserves their jurisdictional rights,⁴² the Convention, which is greatly concerned with the states of take-off and landing, surprisingly never mentions the states overflown by the hijacked aircraft. At first glance, article 4 of the

⁴² The Hague Convention, art. 4, para. 3, provides that the Convention does not exclude any criminal jurisdiction exercised with national law.

Tokyo Convention, which restricts the jurisdiction of the overflowed state by providing that, except in specifically mentioned cases, it "may not interfere with the aircraft in flight in order to exercise its criminal jurisdiction over an offense committed on board. . . .," does apply to overflights of hijacked aircraft. The opposite is true, however, because under article 9 of The Hague Convention, which copies article 11 of the Tokyo Convention, every contracting state is obliged to "take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft."

4. *Miscellaneous Provisions*

Other articles of the Convention establish secondary duties of the states where the alleged hijacker is found and "in which the aircraft or its passengers or crew are present." Article 6 and article 9, paragraph 2, generally reproduce article 13 and article 9, paragraph 2, of the Tokyo Convention. In particular, the state where the hijacker is present shall take him into custody, immediately make a preliminary inquiry into the facts and notify the specified states of such custody and of the circumstances warranting the detention of the alleged offender. In addition, the Convention requires the state to report its findings and any further decisions. Moreover, the state in which the aircraft, its passengers or crew are present shall "facilitate the continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession."

With respect to mutual assistance among states, article 10 provides that, subject to obligations under any other treaty, the contracting states shall, in accordance with existing national law, "afford one another the greatest measures of assistance in connection with [the] criminal proceedings brought in respect of [unlawful seizure of aircraft or any other act of violence against passengers or crew committed in connection with such seizure]."

On April 10, 1969, a permanent Committee on Unlawful Interferences with International Civil Aviation was established by the ICAO Council with a mandate to collect and centralize information on hijacking and to promote possible action by the Council. Hence, article 11 requests all contracting parties to report to the Council, "as promptly as possible, any relevant information in [their] possession concerning: (a) the circumstances of the offense; (b) the action taken pursuant to article 9; and (c) the measures taken with respect to the offender or the alleged offender and, in particular, the results of any extradition or other legal proceedings." This article is remarkable inasmuch as it applies to each state party to the Convention, whether or not that state is also a

party to the Chicago Convention and, therefore, a member of ICAO.

Article 12 deals with the settlement of disputes concerning the interpretation or application of the Convention. It provides that disputes which cannot be settled through negotiation shall be submitted to arbitration. Further, if no agreement is reached the matter can be referred to the International Court of Justice on the request of one of the parties. This is the only article of the Convention which permits a reservation.

5. *A Missing Provision*

It is regrettable that the Convention does not provide for some kind of extra-territorial status or immunity from jurisdiction for the benefit of the passengers and crew in the state to which the aircraft has been hijacked. This type of rule, which should also apply to all cases of unscheduled landings in a foreign country, is urgently needed, particularly in the event of an unlawful seizure of an aircraft.⁴³ Not only does experience show that the persons disembarking from a hijacked aircraft are sometimes searched and detained, frequently for purely political reasons, but they may also be arrested and subsequently prosecuted for any offense in which they allegedly previously committed in a state to which they had no intention of returning and where they were brought against their will.⁴⁴ The Air Law Committee and the Fifty-Fifth Conference of the International Law Association, which met at The Hague in 1970, adopted a resolution to be submitted to ICAO and other appropriate organizations calling attention to the well-established rule in customary international law that grants a degree of immunity from local jurisdiction to ships, their crew, passengers and cargo entering a foreign port in distress; this principle generally should be applicable to distressed aircraft.⁴⁵ Unfortunately, The Hague Conference did not act upon the suggestion.

6. *Final Clauses*

The final clauses are significant because they depart from ICAO traditions. Conventions concluded under the auspices of ICAO are drafted usually in the three working languages of the Organization,

⁴³ See 1968 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 524, in which, subsequent to a case involving the seizure of a passenger's luggage, it was suggested that this rule should be embedded in a general convention relating to facilitation of air transport. Pending the development of that convention, it should be incorporated in particular conventions such as the Tokyo and The Hague Convention.

⁴⁴ For seizure of the contents of luggage at an intermediate stopping place, see *Tribunal Convictional de Dakar*, 1957 REVUE FRANCAIS DE DROIT AERIEN 377. For the arrest, at an intermediate stopping place, of persons on account of their legitimate activities in a foreign state, see 1970 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 142. In both cases, however, those arrested knew, or should have known, that the aircraft was scheduled to land at the place in question.

⁴⁵ ICAO Doc. SA19; INT'L LAW ASS'N, FIFTY-FIFTH ANNUAL REPORT (to be published).

namely English, French and Spanish and, with the exception of The Hague Protocol of 1955 to amend the Warsaw Convention of October 12, 1929, and the Guadalajara Convention of 1961 complementary to the Warsaw Convention, are deposited with ICAO. These precedents were broken by the Convention for the Suppression of Unlawful Seizure of Aircraft.

In order that states not parties to the Chicago Convention may easily ratify and adhere to the new Convention, it was decided to deposit the latter with three Governments—the United States, the Soviet Union and Great Britain—where the Convention would also be open for signature after December 31, 1970. Before that date the Convention was open for signature at The Hague, but only to “states participating in the International Conference on Air Law held in that city from the 1st to the 16th of December, 1970.”

The deposit of the Convention with the Soviet Union also made it necessary to establish an authentic text in the Russian language, in addition to the usual authentic text in the English, French and Spanish languages. Therefore, the Convention was done “in three originals, each being drawn up in four authentic texts in the English, French, Russian and Spanish languages.”

The states represented at The Hague Conference wished to insure the early coming into force of the new Convention and, therefore, the number of ratifications required to that effect was set at ten only. The tenth instrument of ratification was signed by the President of the United States, Mr. Richard M. Nixon, on September 14, 1971, and deposited on that day in Washington, D.C.

III. CONCLUSION

The Hague Convention deals only with “unlawful seizure” committed on board aircraft and does not apply to sabotage committed on the ground, nor does it cover unlawful interferences with air navigation, facilities and services such as airports, air control towers or radio communications. Attempts made to further extend the scope of the Convention were unsuccessful. Nevertheless, the Seventeenth Session of the Assembly of ICAO, held in Montreal in June 1970, adopted a resolution directing “the Council of ICAO to convene the Legal Committee, if possible not later than November 1970, in order to prepare . . . a draft convention on Acts of Unlawful Interference Against International Civil Aviation with the view to adoption . . . as soon as practicable. . . .” Consequently, a second draft convention was prepared by the ICAO Legal Committee,⁴⁶ and a Convention for the Suppression of Unlawful

⁴⁶ See Proceedings and Minutes of and the text of the draft convention prepared by the ICAO Legal Committee in ICAO Doc. 8910 LC/163, at 27.

Acts against the Safety of Civil Aviation was opened for signature at Montreal on September 23, 1971. It is regrettable that similar criminal acts, equally baneful to international aviation, were dealt with in two different but parallel conventions.⁴⁷

⁴⁷ This point has been raised forcefully by the delegate of the Soviet Union in the Air Law Committee of the International Law Association (The Hague, 1970). The Committee, however, did not recommend the merging of the two draft conventions after having been informed that nothing would be gained by advocating a single convention and because the agreement on such a convention might be delayed for several years if the diplomatic conference scheduled to meet at The Hague in December 1970 were asked by the ILA not to limit its work to the efficient suppression of aerial hijacking and to adopt rules relating to other unlawful acts of interference with civil aviation. Moreover, there would not exist, by December 1970, a draft convention duly considered by the states represented at that Conference.